UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LEVINSKY'S INC., et al.,

Plaintiffs

v.

WAL-MART STORES, INC.,

Defendant

Civil No. 95-36-P-C

GENE CARTER, District Judge

ORDER DENYING DEFENDANT'S ALTERNATE MOTIONS FOR JUDGMENT AS A MATTER OF LAW AND FOR A NEW TRIAL

Plaintiffs Levinsky's, Inc., Philip Levinsky, Eric Levinsky, Bruce Levinsky and Kenneth Levinsky ("Levinsky's") commenced an action against Wal-Mart Stores, Inc. ("Wal-Mart") on February 3, 1995, seeking, inter alia, damages for alleged defamation. On July 15, 1996, a jury returned a verdict against Wal-Mart on Count I (Defamation), awarding $600,000 in "presumed" compensatory damages.[1] Now before the Court for decision is

[1]The Plaintiff did not prove any actual pecuniary damages. In Saunders v. VanPelt, 497 A.2d 1121 (Me. 1985), the Supreme Judicial Court of Maine acknowledged the well-established principle that "words falsely spoken are slanderous per se if they relate to a profession, occupation or official station in which the plaintiff was employed. Malice is implied as a matter of law in such cases, and the claimant may recover compensatory damages without proving special damages." Id. at 1124-25 (citing Farrell v. Kramer, 193 A.2d 560, 562 (Me. 1963)).

This case was submitted to the jury under the instruction that if the jury found defamation per se, "[a] plaintiff so defamed is entitled to damages sufficient to compensate him or her for . . . humiliation, and for such injury to . . . reputation, as have been proved or may reasonably be presumed from the proof, to have occurred." Tr. at 312.

Defendant's Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial (Docket No. 56). For the reasons stated below, the Court will deny the motion.

I. FACTS

Levinsky's is a family-owned retail clothing and footwear business which, during the time period relevant to this case, operated stores in Portland, Windham, and Freeport, Maine. Affidavit of Eric S. Levinsky ("Levinsky Aff.")(Docket No. 14) paragraphs 3, 7. Wal-Mart is a national retail chain which sells clothing and footwear, among other items. In the fall of 1994, Levinsky's ran a radio advertisement comparing Levinsky's merchandise and prices to those of Wal-Mart. Levinsky Aff. paragraphs 13-14. Later that year, Michael Boardman, a freelance journalist working on an article for BIZ magazine, interviewed Gilbert Olson, an assistant manager at the Wal-Mart store in Scarborough, Maine. Tr. at 163, 204. Boardman then wrote an article in which he quoted two statements by Olson about Levinsky's, which subsequently became the focus of the defamation action: (1) Olson said that Levinsky's was "trashy," and (2) Olson made a statement to the effect that when calling the Levinsky's store, "you are sometimes put on hold for twenty minutes -- or the phone is never picked up at all." Michael Boardman, Levinsky's: *Leaner and Meaner with Retail Competition*, BIZ, Jan./Feb. 1995, at 4, Exh. C to Defendant's Motion for Summary Judgment (Docket No. 7).

Testimony at trial revealed that the statements resulted in injury to the store's business reputation. Tr. at 143, 147. The jury awarded $600,000 in presumed compensatory damages. Jury Verdict Docket No. 52).

II. DISCUSSION

A. MOTION FOR JUDGMENT AS A MATTER OF LAW

In ruling on a motion for judgment as a matter of law, a court must consider all of the evidence in the light most favorable to the plaintiff and may rule in the defendant's favor only if the court determines that a reasonable jury could not have found in favor of the plaintiff. See Coastal Fuels of P.R., Inc. v. Caribbean Petroleum, 79 F.3d 182, 188 (1st Cir. 1996), cert. denied, 136 L. Ed. 2d 214 (1996).

1. Waiver

As a threshold matter, Plaintiff contends that Defendant forfeited the right to bring this motion for judgment as a matter of law by failing to renew its motion at the close of all the evidence. Defendant initially moved for judgment as a matter of law when the Plaintiff rested. Tr. at 169, lines 10-11. The Court reserved ruling on the issue until hearing all of the evidence. Tr. at 188. After the Defendant rested, the Court denied the Motion as to the defamation count. Tr. at 249, line 9, and 264, lines 13-14. The only evidence which followed the Court's ruling was the entry of a stipulation as to the Defendant's net worth. Tr. at 166, lines 20-25.

Plaintiff argues that Defendant waived the right to move for judgment as a matter of law by failing to formally renew its motion upon the close of all the evidence. Defendant asserts that in circumstances such as these, Defendant's motion was implied, and that Rule 50(b) does not require a formal recitation of words renewing such a motion.

In Bayamon Thom McAn, Inc. v. Miranda, 409 F.2d 968 (1st Cir. 1969), the Court noted the "stringent rule" that the failure to renew a motion at the close of all evidence constitutes a waiver of the right to move for judgment notwithstanding the verdict. Id. at 971 (citing Home Ins. Co. of N.Y. v. Davila, 212 F.2d 731 (1st Cir. 1954)). The Court acknowledged a narrow exception to this rule, however, holding that the legal issues raised by a motion are not waived where the evidence which follows the motion is "brief and inconsequential" to the substance of the motion. Id. at 972. The Court finds that the stipulation pertaining to Wal-Mart's net worth, which followed the Court's ruling in this case, was inconsequential to Defendant's motion regarding the actionability of the statements. Thus, the Court concludes that Defendant did not waive the right to bring this post-trial motion for judgment as a matter of law regarding the actionability issue.

2. Actionability and Falsity of the Two Statements

Defendant Wal-Mart asserts that it is entitled to judgment as a matter of law on the grounds that neither statement is actionable. The Court will consider each statement in turn.

First, Defendant argues that the statement that Levinsky's store is "trashy" does not contain stated or unstated "provably false" facts. The Court remains convinced that the statement is actionable as an opinion which could reasonably be understood to imply undisclosed defamatory facts. According to the testimony elicited on cross examination, Mr. Boardman understood the statement to refer to the store's appearance and "thought [it] was [Gilbert Olson's] opinion based on something that [Olson] had observed." Tr. at 63, lines 5-6, 10-12. The adjective "trashy" conveys facts that are capable of being verified or disproved through a straightforward inquiry into the condition of the store's physical appearance. Based on the testimony adduced at trial, the jury could reasonably have concluded that the statement was defamatory in that there was ample testimony to support the Plaintiff's assertion that the "trashy" statement was false. Viewing all of the evidence in the light most favorable to Plaintiff, the Court concludes that the "trashy" statement is actionable.

Second, Defendant argues that the statement to the effect that Levinsky's keeps customers on hold for twenty minutes was not actionable. The Court concludes that the statement was actionable insofar as it is a provably false assertion and there was sufficient evidence for a reasonable jury to conclude that it was, indeed, false. Specifically, Olson testified that he made at least three different calls to Levinsky's, and that he was "on the phone each time maybe 10 minutes [f]or a total of 20 minutes

or more."[2] Tr. at 214. The Court finds that this evidence was sufficient to allow a reasonable jury to conclude that the precise statement that Levinsky's keeps customers "on hold for 20 minutes" is false. Furthermore, the Court properly instructed the jury on the doctrine of "substantial truth," and the jury was entitled to conclude that the actual statement uttered produced a different effect upon its audience than that which would have resulted if the audience had heard the literal truth. The Court is satisfied, therefore, that both statements are actionable.

3. Presumed Damages

The recovery of presumed damages in a case involving a matter of public concern, Defendant correctly points out, requires a showing of actual malice. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985). Relying upon the holdings in Gertz and Dun & Bradstreet, Defendant asserts that Plaintiff is not entitled to presumed damages since Plaintiff failed to make a showing of actual malice.

In order to determine whether speech involves matters of "public concern," a court examines the "content, form and context" of the communication. Dun & Bradstreet, 472 U.S. 749, 761 (citing Connick v. Myers, 461 U.S. at 147-48). According to

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[2]The Court notes that while the transcript reads "or a total of 20 minutes or more," it is the Court's recollection that the testimony was "for a total of 20 minutes or more," implying that the three calls, taken together, constituted 20 minutes or more of waiting on hold.

Defendant, the "content, form, and context" of Olson's statements indicate that he was speaking on matters of public concern. The Court acknowledges that the business competition between Levinsky's and Wal-Mart had been the subject of radio advertising. However, the Court finds it ironic that Defendant should argue at this stage that the context of the speech reveals that Olson was speaking on a matter of public concern. Both Defendant's opening statement and Olson's testimony strongly assert that Olson perceived that he was conversing privately with a university student researching a paper.[3] While the facts in this case are distinguishable from those in Dun & Bradstreet, the Court is persuaded that Olson's comments do not reflect matters of public concern. Plaintiff was not, therefore, required to make a showing of actual malice in order to recover presumed damages.

4. Fault

To satisfy the fault element of defamation, the Plaintiff was required to show that Olson "act[ed] negligently in failing to ascertain" that his statements were false and defamatory. See Restatement (Second) of Torts sections 558, 580(B)(c) (1977).

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[3]"I thought I was talking to a college student looking for information for an essay or paper of some kind." Tr. at 210-11.

See also Transcript at 32 ("Mr. Olson is very clear, very clear that he did not understand that he was talking to a member of the media to begin with. . . . [H]e understood, loud and clear, that he was talking to somebody who was writing a paper for school. It sounded like the person was a university student . . .").

The proper inquiry, as Defendant points out, is whether Olson had reasonable grounds to believe the veracity of his communication. Restatement, section 580B cmt. g. Defendant argues that the record does not establish fault and that Plaintiff's failure to prove Olson's negligence entitles Defendant to judgment as a matter of law. Additionally, Defendant insists that Wal-Mart's statement in its closing argument that Olson might have made a "mistake," was not a concession that Olson acted negligently.

Olson's testimony revealed that his "trashy" statement was intended to refer to the Freeport store only. Tr. at 213. Olson was obviously familiar with Levinsky's business, in that Levinsky's was located in Wal-Mart's geographical area of competition. Tr. at 224. Olson had even sent people to Levinsky's to check prices on occasion. Id. The Court is persuaded, then, that a reasonable jury could have concluded that Olson should have known that the blanket statement that Levinsky's was "trashy," without specifying which store he was referring to, was false. In addition, in testifying that his statement about being kept on hold referred to three separate phone calls, Olson essentially admitted that the "20 minutes" statement was false. Regardless of whether the Defendant's closing remarks constitute a formal concession of negligence, the Court finds that a reasonable jury could conclude that Olson either knew or should have known that his statements were false or defamatory. Thus, the Court finds that the jury could reasonably have concluded that Olson acted negligently, and the Court declines to enter judgment as a matter of law in

Defendant's favor on the issue of fault.

B. MOTION FOR A NEW TRIAL

As an alternative to its motion for judgment as a matter of law, Defendant seeks a new trial on the issues of liability for defamation and damages. The Defendant argues that (1) the Court erred in failing to instruct the jury as to whether the statements constituted fact or opinion, (2) the Court erred in failing to instruct the jury on the element of fault, and (3) the jury's findings on liability and damages were excessive, against the clear weight of the evidence, and resulted from passion or prejudice.

First, Defendant argues that the specific question of whether the statements were intended as fact or opinion should have been submitted to the jury. Defendant relies upon Caron v. Bangor Publishing Co., 470 A.2d 782 (1984), which states that, "if the average reader could reasonably understand [an allegedly defamatory] statement as either fact or opinion, the question of which it is will be submitted to the jury." Id. at 784. The Court did, in fact, instruct the jury that it was responsible for deciding whether the statements could be understood as either fact or opinion.[4] The Court did not instruct the jury as to

[4]Specifically, the Court instructed the jury as follows:

> "If you find that either [statement] constitute[s] a description or opinion based upon unstated or undisclosed facts, you must nevertheless determine whether the underlying objective facts can be reasonably understood as false and therefore defamatory. . . . If

"pure" opinion, but it was within the Court's discretion to determine as a matter of law that neither statement could reasonably be understood as a simple opinion. Restatement (Second) of Torts section 614 (1977). Moreover, Boardman's testimony, as discussed in Section A(2), supra, reflects that Olson's opinion implied a series of other verifiable facts (i.e., that Olson had been to Levinsky's and that Olson had observed something upon which he based the assertion that the store was "trashy").

Second, Defendant argues that the Court erred in declining to instruct the jury on the legal standard for the element of fault. Defendant asserts that it was at least entitled to an instruction as to whether Olson knew or should have known that his statements were false or defamatory. The Court declined to instruct the jury, as Defendant had requested, on the issue of negligence. Tr. at 297-329; see also Tr. at 332, lines 6-8. Given that malice is implied in cases of slander per se, see footnote 1, supra, it was proper for the Court to deny such an instruction. As noted above, the Court is persuaded, based upon the record, that the jury had sufficient evidence to conclude that a reasonable person in Olson's position would have exercised

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> you find that either [statement] . . . was capable of being reasonably understood as a statement of objective fact, rather than an opinion or description, but you nevertheless find that the facts conveyed were true, then you must find in favor of the defendant."

Tr. at 308, lines 19-23, and 310, lines 5-10.

greater care in commenting on such matters.

Third, Defendant argues that Defendant is entitled to a new trial on both liability for defamation and on damages, on the grounds that the jury's findings on each were excessive, against the clear weight of the evidence, and resulted from passion or prejudice. The Court disagrees. Having had the opportunity to weigh the evidence and to judge the credibility of the witnesses, the Court is satisfied that the jury's finding of liability is not against the clear weight of the evidence.

On the issue of damages, the jury was instructed that in the event that it found defamation per se, then it should award such compensatory damages as may "reasonably be presumed." See footnote 1, supra. The Court is satisfied that this was a proper instruction, given the difficulty of proving damages of this nature, and given that "[a defamation] of a corporation, its credit, its ability to do business or its methods of doing business is a [defamation] per se and actionable without allegation or proof of special damages." Cooperativa De Seguros Multiples De Puerto Rico v. San Juan, 294 F. Supp 627, 630 (D.P.R. 1968).

Additionally, the Court concludes that a remittitur is not warranted in this case, since the damages were neither "grossly excessive," nor "shocking to the conscience." Segal v. Gilbert Color Sys., Inc., 746 F.2d 78, 81 (1st Cir. 1984) (citing McDonald v. Federal Labroatories, 724 F.2d 243, 246 (1st Cir. 1984)). Nor can it be said that the jury verdict represents a "manifest miscarriage of justice." Riofrio Anda v. Ralston

Purina Co., 772 F. Supp 46, 49 (D.P.R. 1991) (quoting Hubbard v. Faros Fisheries, Inc., 626 F.2d 196, 200 (1st Cir. 1980)). Moreover, the Defendant was not prejudiced by the Court's refusal to bifurcate the liability and damages phases of the trial. As Plaintiff points out, it was within the Court's discretion to decline to bifurcate the trial. Gonzalez-Marin v. Equitable Life Assurance Society of the United States, 845 F.2d 1140, 1145 (1st Cir. 1988).

III. CONCLUSION

Accordingly, Defendant's Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial, is hereby DENIED.

So ORDERED.

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GENE CARTER
District Judge

Dated at Portland, Maine this 11th day of February, 1997.